82-655

No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOARD OF EDUCATION, LEVITTOWN UNION FREE SCHOOL DISTRICT, NASSAU COUNTY, *et al.*,

Appellants,

—v.—

EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF NEW YORK, *et al.*,

Appellees.

APPEAL FROM THE NEW YORK COURT OF APPEALS

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does a federal equal protection challenge to New York State's school finance scheme, which scheme has been found to discriminate among school districts on the basis of disparities in local property wealth and thereby to produce significant unevenness in educational opportunities, require a mode of judicial scrutiny more sensitive than the toothless "rational basis" test applied by the New York Court of Appeals?

2. Is New York's school finance scheme rationally related to its alleged purpose of preserving and promoting "local control" of education, where the state courts charged with finding facts found to the contrary and where the aid formula sought to be defended on this ground was not applicable to most school districts?

PARTIES BELOW

The state court litigation resulting in the judgment sought to be reviewed was brought by the "original plantiffs"—the boards of education of 27 property-poor school districts located in 13 New York counties,* together with 12 children by their parents or guardians.** The children named as plaintiffs

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* In Nassau County, Levittown and Roosevelt; in Suffolk County, Bayport-Blue Point, Brentwood, Brookhaven-Comsewogue, Commack, Copiague, East Islip, Lindenhurst, Middle Country, Sachem, South Country and South Huntington; in Westchester County, Lakeland; in Saratoga County, Burnt Hills-Ballston Lake, Saratoga Springs and Shenendehowa; in Schenectady County, Schenectady City Schools and Scotia-Glenville; in Albany County, Guilderland; in Cortland County, Marathon; in Delaware County, South Kortright; in Erie County, Buffalo City Schools; in Monroe County, Churchville-Chili; in Putnam County, Mahopac; in St. Lawrence County, Knox Memorial; and in Wayne County, Clyde-Savannah.

** Gerri Lynn Grau, an infant, by Herman Grau; Joanne Maturo, an infant, by Dominick Maturo; Sean Sanborn, an infant, by Jay San-

attended public elementary or secondary school in seven of the plaintiff school districts. Defendants included New York State's Commissioner of Education, the University of the State of New York, and New York State's Comptroller and its Commissioner of Taxation and Finance. Plaintiffs-intervenors throughout the state court proceedings were the boards of education of four large New York cities, the City of New York, various mayors and other governmental officials and units, and a number of urban school children.* All parties to the proceedings below remain parties to this appeal except the Boards of Education of Churchville-Chili, Commack, Guilderland and Buffalo.**

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born and Mary Ann Sanborn; Suzanne McKenna, an infant, by John McKenna and Angela McKenna; Jane McKenna, an infant, by John McKenna and Angela McKenna; Mark McKenna, an infant, by John McKenna and Angela McKenna; Karen McKenna, an infant, by John McKenna and Angela McKenna; Walter Howard, Jr., an infant, by Barbara L. Howard; Mary Beth Selee, an infant, by Donald Selee; Robert Selee, an infant, by Donald Selee; John M. Collins, Jr., an infant, by John M. Collins; and Simone Wynn, an infant, by Prathia Wynn and Ralph Wynn.

* Plaintiffs-intervenors included the Boards of Education of Rochester, New York, Buffalo and Syracuse; the City of New York; the Mayors of New York and Syracuse; the Director of the Bureau of the Budget of the City of New York; United Parents Association of New York, Inc.; the Superintendents and Presidents of the Boards of Education of Rochester, Buffalo and Syracuse; the Chancellor and President of the Board of Education of the City of New York; and various school children by their parents and natural guardians.

** Buffalo, which was both an original plaintiff and a plaintiff-intervenor in the state court proceedings, remains a party to the appeal to this Court brought by the plaintiffs-intervenors.

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Appellants, the boards of education of 23 property-poor rural and suburban school districts in 10 New York counties, together with 12 school children by their parents or guardians, appeal from a final judgment of the New York Court of Appeals which rejected their constitutional challenge to the State's school finance scheme. We understand that the plaintiffs-intervenors (the "city plaintiffs") are filing a separate appeal from the same judgment.

OPINIONS BELOW

The majority and dissenting opinions of the New York Court of Appeals are reported at 57 N.Y.2d 27, and are reprinted in the separate Appendix to this Jurisdictional Statement at A1-34. The opinions of the Appellate Division, Second Department, are reported at 83 A.D.2d 217 and 443 N.Y.S.2d 843, and are reprinted at A35-88. The opinion of Justice L. Kingsley Smith of the Supreme Court, Nassau County, is reported at 94 Misc. 2d 466 and 408 N.Y.S.2d 606, and is reprinted at A239-310. The unpublished findings of fact of Justice Smith, as updated and adopted by the Appellate Division, are reprinted at A98-238.

JURISDICTION

Appellants commenced this action in 1974, seeking a judicial declaration that the manner in which New York State finances its public elementary and secondary schools violates the Equal Protection Clause of the United States Constitution, as well as the Equal Protection Clause and Education Article of the New York State Constitution. The judgment of the New York Court of Appeals, reversing the trial and intermediate appellate courts and finding no violation of these constitutional provisions, was entered on June 23, 1982. A notice of appeal was filed in the New York Court of Appeals and in the Supreme

Court, Nassau County, on September 7, 1982, and is reprinted at A326-328. On September 13, 1982, Justice Marshall granted appellants' request for an extension of time in which to docket this appeal to and including October 12, 1982. This Court has jurisdiction under 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The language of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Section 3602 of New York's Education Law are set forth in the Appendix to this Jurisdictional Statement at A331-385.

STATEMENT OF THE CASE

On Tuesday, September 7, 1982, the Superintendent of Schools in Scarsdale, New York, greeted his returning faculty as follows:

> "Let me begin by observing that we are all very lucky to be here. In a time when nearly 10 percent of the labor force is out of work, and when school districts all around us are discharging teachers by the dozens and the hundreds, *we* have *our* jobs in good working conditions and, relative to our profession, with comparatively high salaries and benefits."[1]

The Superintendent, who testified at trial and whose district participated as an amicus in the New York Court of Appeals, thus put his finger on what this case is about. Under the statutory scheme adopted as an avowedly "interim" measure in 1974, but which has frozen into a grotesque ice-bound permanence, the approximately 700 school districts in New York—

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1 *Scarsdale Inquirer,* Sept. 9, 1982, at 6, col. 3 (emphasis added).

both rich and poor—are left essentially to their own devices. Affluent districts like Scarsdale and Great Neck are free to tap small percentages of their abundant property wealth in order amply to support school programs. Neighboring property-poor districts like Lakeland, Levittown or nearly all-black Roosevelt are driven to heavily burden their pathetically thin tax bases in order to eke out a fraction of the programs offered by affluent neighbors. By accident of history and geography—for no one can explain current school district boundaries—and as a result of legislative omission or commission, extraordinary disparities have come to characterize school finance in New York. Rich districts pay lower taxes, yet are able to offer their children better schooling as measured by smaller classes, more professional and non-professional staff, more teaching aids, fuller curricula, better facilities, and all the other things that the courts below found money can buy. Poor districts simply do without. This appeal raises the question whether such inequalities are permissible under the Equal Protection Clause of the United States Constitution.

The original plaintiffs—the school boards of 27 property-poor rural and suburban school districts, plus a number of school children and their parents—filed suit in 1974 in Supreme Court, Nassau County. Their complaint charged that the nexus between local property wealth and school expenditures, and the resulting inequalities in educational opportunity and quality, violate the Equal Protection Clause of the Federal Constitution, as well as the Education Article and Equal Protection Clause of the State Constitution. The inequities complained of were already well known to all. The Fleischmann Commission appointed by Governor Rockefeller in 1969 had issued a three-volume report documenting these inequalities in authoritative detail. Gubernatorial task forces appointed by Governor Rockefeller's successors, Malcolm Wilson and Hugh Carey, came to the same conclusion that existing school finance inequities were intolerable. In 1974, the legislature had responded to this consensus by adopting what is essentially the present statutory scheme—ostensibly as an "interim" measure

until inequities could be eliminated. When legislative rigor mortis began to set in, this litigation arose.

Four of the State's largest cities—New York, Buffalo, Rochester and Syracuse—along with their mayors, other government officials and governmental units, and individual students and parents, quickly joined in as plaintiffs-intervenors. They concurred in the positions taken by the original plaintiffs, but also introduced their own special urban focus.

Between April 1976 and January 1977, Justice L. Kingsley Smith presided over a 122-day trial. In the fullest exploration of a school finance system ever conducted in a courtroom, some 128 witnesses, 400 trial exhibits and 23,000 pages of trial testimony documented what everyone already knew. That is, the trial established—and the trial judge so found in over 400 discrete findings—that New York's school finance scheme discriminates among districts on the basis of local property wealth, that the legislature has allowed hundreds of unevenly endowed districts to bear the principal burden of supporting their own schools. Property-rich districts like Scarsdale and Great Neck enjoy the luxury of fashioning and implementing educational policies of their own choice—thanks to their abundant local resources, supplemented by distributions from the legislature in the form of "flat grants" to all districts on a per-pupil basis, "save-harmless" provisions which insulate most districts from actual operation of the state aid formula, and other forms of legislative largess. Property-poor districts, on the other hand, must make do with less. Rather than formulate and pursue their own educational policies, they have been reduced to a kind of educational triage—desperate annual determinations as to which programs to cut, what teachers and other staff to let go, and which necessary tools to do without.

After extensive post-trial briefing, the trial judge rendered an opinion on June 23, 1978, concluding that New York's school finance scheme violates both the federal and state constitutions,[2] supporting his opinion with elaborate findings

2 The trial court concluded that plaintiffs had abandoned their federal equal protection claim, but proceeded to find the school finance

of fact carefully keyed to the trial record. Justice Smith found that rich districts spend more money per pupil than poor districts, that they do so with a lower tax effort, and that they use the more ample funds raised from their richer tax bases to buy more education resources and to offer a substantially higher level of educational opportunity to their own children. He found that even the allegedly equalizing provisions of the school finance scheme fail to correct these inequities, and that in many respects they exacerbate them. In response to the plaintiffs-intervenors' federal claim, he found the scheme "irrational," rejecting the State's argument that such inequities are the price that must be paid in order to preserve and promote "local control." In so finding, he relied upon testimony from the State's own witnesses that the present scheme is in fact inconsistent with local control, and that reforms can be made without sacrificing that objective.

The Appellate Division, Second Department, on October 26, 1981, affirmed the trial court's decision invalidating the school finance scheme, but on the state constitutional grounds sustained by the trial court rather than on federal constitutional grounds. It updated the trial court's findings of fact so as to reflect more recently available data, as well as minor changes made in the statutory scheme by the legislature through October 1981. These updated findings are included in the Appendix at A98-238.

While the appeal from Justice Smith's decision was proceeding through the state appellate courts, still another gubernatorial task force was appointed to examine the statutory scheme and to fashion alternatives to recommend to the legislature in the event the decision were affirmed. The report of the Special Task Force on Equity and Excellence in Education (the "Rubin Commission") was submitted to the Governor on February 1,

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scheme "irrational" in response to plaintiffs-intervenors' own federal equal protection claim. Both appellate courts reached and decided plaintiffs' federal claim.

1982. In forwarding the report, Chairman Rubin wrote the Governor:

> "Of course, we do not know what the outcome as to constitutionality will be in the Court of Appeals. But we do know that serious inequities exist in the present formula."

Its three-volume study confirmed the findings of the trial court that gross disparities exist in the statutory scheme, that local property wealth is the chief source of differences in spending among districts, and that rich districts use their more abundant resources to provide greater opportunities for their children than is possible in property-poor districts. And in the face of the State's assertion that legislative changes subsequent to trial had ameliorated the inequalities, the Commission agreed with the intermediate appellate court that the passage of time has only exacerbated them and made the need for reform more compelling. Finally, it concluded that effective reforms were in fact available, and could reduce or eliminate inequalities at an affordable price and without sacrificing local control. That truth was also reflected in Governor Hugh Carey's February 17, 1982 education message to the legislature. He urged that:

> "New York State must act now to redress the inequities inherent in its school aid formula. . . . Today, the financial inequalities in education are more pronounced than at any time in the State's history.
>
> "The divergence in spending between wealthy and poor districts increases annually, with the taxpayers in poorer districts facing intolerable, escalating property taxes.
>
> "New York must stop the unfairness and inequity in the financing of education. We need to demonstrate to all New Yorkers that our great State clearly stands for equality in educational opportunity."

That was not to be. On June 23, 1982, the New York Court of Appeals, over the dissent of Judge Fuchsberg, reversed the

decisions below, rejecting the state and federal constitutional claims advanced by both original plaintiffs and plaintiffs-intervenors. The court accepted the elaborate and carefully documented findings of the trial judge as updated by the Appellate Division. And even the majority agreed that:

> "[I]t must be recognized that there are . . . significant inequalities in the availability of financial support for local school districts, ranging from minor discrepancies to major differences, resulting in significant unevenness in the educational opportunities offered. These disparities may properly be ascribed in some respects to the wide variances between the property assessment bases on which local district taxes are imposed." 57 N.Y.2d at 38, A12 (footnote omitted).

Nevertheless, the majority summarily rejected the original plaintiffs' federal equal protection claim on the ground that such a claim had been "considered and rejected" by this Court in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). The Court of Appeals noted that in *Rodriguez* a "rational basis" test, rather than "strict scrutiny," had been applied to evaluate the Texas school finance system, and that this Court found in Texas "a rational relationship to a legitimate State purpose—the permission and encouragement of participation in and control of public schools at the local district level." 57 N.Y.2d at 41, A15. Without explanation or analysis, the court held that "the conclusions reached in that case dictate a similar result in the present litigation insofar as the original plaintiffs' claim of a Federal Constitution violation is concerned." *Id.*

The court did not consider whether some standard other than "rational basis" ought to be applied to the federal constitutional claim. And it assumed without analysis that the "reasonableness" finding made by this Court in connection with the Texas statutory scheme challenged in *Rodriguez* would apply equally to New York.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This case presents the question whether the decision in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), precludes meaningful judicial review of the manner in which states finance public education.

In *Rodriguez*, this Court rejected a challenge to Texas's school finance system, finding that State's then statutory scheme rationally related to a legitimate objective. The New York Court of Appeals, citing *Rodriguez*, purported to apply the same "rational basis" test; it upheld the constitutionality of New York's school finance scheme on the ground it was rationally related to the "preservation and promotion of local control of education." 57 N.Y.2d at 44, A18.

The Court of Appeals erred in two basic respects. First, it ignored the trend in this Court's jurisprudence away from rigid adherence to a two-tiered, outcome-determinative mode of equal protection review—even in education. *See Plyler v. Doe*, 102 S. Ct. 2382 (1982). Second, it failed properly to apply even the "rational basis" test—accepting as gospel the purported excuse for statutory inequities which had been rejected by the lower court finders of fact.[3]

The effect of its decision is that New York retains an unfair and discriminatory school finance scheme, virtually immune from judicial scrutiny. And hopes of breaking the long-standing legislative deadlock have been dashed. This is so even though plaintiffs have demonstrated the scheme's gross disparities and inequalities to the complete satisfaction of the trial and intermediate appellate courts, which adopted extensive findings of fact, characterized as "careful and detailed" by the

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3 New York's highest court is ordinarily bound by the findings of fact made by the trial and intermediate appellate courts. *See* N.Y. Const., Art. VI, § 3, subd. a; N.Y. C.P.L.R. § 5501(b); *Lue v. English*, 44 N.Y.2d 654, 655 (1978); *Matter of Ray A.M.*, 37 N.Y.2d 619, 622-23 (1975).

Court of Appeals. These findings include a well documented determination that the only ostensible purpose advanced to justify the scheme—local control—is "illusory" in property-poor districts, and more readily achievable in a reformed system.

A. The Court of Appeals erred in requiring only a "rational basis"

The Court of Appeals' conclusion that New York's school finance scheme satisfies the requirements of the Federal Equal Protection Clause was summarily dumped on the doorstep of *Rodriguez*. The court merely summarized plaintiffs' contentions, noted that *Rodriguez* had applied "rational basis" to evaluate the Texas scheme, and assumed without analysis that the result in the earlier case "dictate[s] a similar result in the present litigation." 57 N.Y.2d at 41, A15.

In *Rodriguez*, this Court upheld Texas's method of financing its public schools against an equal protection challenge. It declined to apply the so-called "strict scrutiny" mode of equal protection analysis on the ground that education is not among the "fundamental" rights given explicit or implicit protection under the Federal Constitution. And on the skimpy factual record before it—there had been only a truncated trial-type hearing before a three-judge court—it concluded that Texas's school finance system somehow bore a rational relationship to the legitimate state purpose of preserving and encouraging local control of education.[4]

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4 The Court found no resolution by the three-judge court of the basic question whether there is a "demonstrable correlation" between educational spending and quality. 411 U.S. at 43 n.86. In contrast, the New York Court of Appeals affirmed the explicit findings of the lower courts that there is such a correlation, stating that "[w]e are assuming that there is a significant correlation between amounts of money expended and the quality and quantity of educational opportunity provided." 57 N.Y.2d at 38 n.3, A12. The findings, based on testimony even from the State's own witnesses, left no doubt on that score. *See* Findings 26-79, A126-156.

1. "Rational basis" review has led to legitimation of the intolerable

Plaintiffs alleged and proved that local taxable real property wealth is unevenly distributed among New York's 700 major school districts (Findings 12-14, A117-120); that property-poor districts are unable to raise as much money for schools as property-rich districts (Findings 24-25, A123-125); that there is a direct correlation between local property values and educational expenditures (Findings 18-23, A122-123); and that differences in expenditures produce differences in educational opportunities (Findings 26-79, A126-156). Students who happen to grow up in poor districts have significantly larger classes, fewer and less qualified professional and non-professional staff, fewer books and field trips, poorer curricula—in general, less of nearly everything that rich districts choose to buy.

Plaintiffs further proved that legislative attempts to ameliorate this inequality have been ineffective, and often counterproductive. Continuation of so-called "flat grants" of $360 per student to even the most affluent districts, as well as pervasive use of "save-harmless" provisions to protect districts against any reductions in state aid without regard to the ostensible aid formula, have perpetuated and exacerbated the problem. The Appellate Division found that legislative changes made since 1974 have "had no substantial effect in alleviating the conditions flowing from the educational finance structure." Finding 84, A159.

The plight of the property-poor district in New York can best be shown by concrete example. For example, in Brentwood, the poorest district in Suffolk County,[5] budget cuts have forced the elimination of elementary summer school programs, per-

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5 At $34,804, Brentwood has less than one-twentieth the taxable wealth per pupil as Amagansett at $746,160. Amagansett, with a tax rate one-fifth of Brentwood's ($6.16 v. $33.09) outspends Brentwood by more than two to one, and has almost three times the professional staff per 1,000 pupils.

forming arts and outdoor education programs. The district has been forced to halve its music education staff and drop courses in typing, business law, business practices and business mathematics. Nine of its 12 elementary schools have no assistant principal. Lack of funds forced a reduction in the number of guidance counselors, and the budget for college counselors was cut. Kindergarten children with speech defects could not be treated until they were in the first grade, and the district has had difficulty meeting state recommendations and minimum standards for identification and treatment of other handicapped or troubled children. Findings 81-82, A156-158.

Similarly, in Levittown, the poorest district in Nassau County after Roosevelt,[6] budget cuts caused reductions in the number of basic courses and forced elimination of advanced classes in mathematics, languages and mechanical arts. Moreover, desired programs in industrial arts, foreign languages and physical education could not be initiated. Financial difficulties even caused the school board to furlough all teachers for a week without pay. *Id.*

The pattern of inequality is not merely anecdotal, for the undisputed evidence shows a remarkably consistent pattern in New York. As district property wealth increases, so do school expenditures, the number of professional and non-professional staff, and all the other resources that money can buy. Wealthy districts have as much as 50 times the wealth of poor ones, outspend them by as much as 5 to 1, and use their greater resources to purchase greater educational opportunities. *See especially* Findings 11-79, A117-156.

Findings like these formed the basis for the conclusions of both lower courts that New York's school finance scheme violates New York State's Education Article and the State Equal Protection Clause. Under the State Constitution, both

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6 Levittown has one-fourth Manhasset's property wealth ($51,000 v. $196,000), taxes itself more heavily ($30.49 v. $19.61), is outspent $4,542 to $3,371 and has nearly 12 fewer professional staff per 1,000 pupils.

courts applied a "sliding scale" of equal protection analysis: a statutory scheme that impinges upon an important state interest is upheld only if the discrimination furthers a *substantial* state interest, and if the objective purportedly furthered cannot be accomplished by a less intrusive alternative. When this test was applied to school finance in New York, the scheme did not pass muster.

The Court of Appeals, however, rejected heightened scrutiny even under the State Constitution and held, parroting *Rodriguez,* that deprivation of education is entitled only to a "rational basis" test, nothing more. The court so held in the fact of the explicit guarantee of education in the State Constitution that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of the state may be educated." N.Y. Const. Art. XI, § 1. And it so held despite the Education Article's legislative history that "[t]here seems to be no principle upon which the people of this commonwealth are so united and agreed as this, that the first great duty of the State is to protect and foster its educational interests." 1894 Constitutional Documents, quoted in Judge Fuchsberg's dissent in the Court of Appeals, 57 N.Y.2d at 52, A26.

The Court of Appeals simply missed the point of the last decade of equal protection jurisprudence. It failed to recognize that courts no longer choose one of two extreme, outcome-determinative modes of equal protection scrutiny. More importantly, the court failed to follow the teaching of *Plyler v. Doe* that challenges to deprivations of education are entitled to heightened, if not strict, scrutiny.

2. This Court has itself moved away from rigid adherence to a two-tiered standard of review

The intermediate or heightened scrutiny mode of equal protection analysis arose out of a widespread recognition that the traditional two-tier approach was overly rigid and outcome-determinative. Doubts as to the appropriateness and

validity of two-tier analysis—limited to either strict scrutiny or rational basis—have been reflected in a series of decisions by this Court applying a more sophisticated mode of analysis.

Even before *Rodriguez,* the Court had begun to move away from simple two-tier analysis in cases involving challenges to statutory classifications based on illegitimacy and gender. At least an implicit form of heightened scrutiny led to invalidation of statutes denying workmen's compensation to unacknowledged illegitimate children, *Weber v. Aetna Casualty and Surety Co.,* 406 U.S. 164 (1972), or classifying people on the basis of sex, *Reed v. Reed,* 404 U.S. 71 (1971). And an intermediate "sliding-scale" analysis was explicitly argued by Justice Marshall in a series of dissents including *Dandridge v. Williams,* 397 U.S. 471, 519-30 (1970); *Richardson v. Belcher,* 404 U.S. 78, 90-96 (1971), and *Rodriguez* itself, 411 U.S. at 98-110.

In *Rodriguez,* Justice Marshall, joined by Justice Douglas, summarized what he believed was an excessively "rigidified" approach to equal protection:

> "The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." 411 U.S. at 98-99.

Since *Rodriguez,* heightened scrutiny has been explicitly approved by an increasing number of Justices, and has been

applied by the Court in a variety of cases involving legislative classifications outside the current list of suspect categories and fundamental rights. *See, e.g., Mississippi University for Women v. Hogan,* 50 U.S.L.W. 5068 (U.S. July 1, 1982) (gender); *Michael M. v. Superior Court of Sonoma County,* 450 U.S. 464 (1981) (gender); *Wengler v. Druggists Mutual Insurance Co.,* 446 U.S. 142 (1980) (gender); *Caban v. Mohammed,* 441 U.S. 380 (1979) (illegitimacy); *Lalli v. Lalli,* 439 U.S. 259 (1978) (illegitimacy); *Craig v. Boren,* 429 U.S. 190 (1976) (gender); and *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975) (gender).

There has been, in effect, a growing recognition that two-tiered scrutiny is inadequate to deal with rights that are too important to be cast away under an overly complaisant "rational basis" test, but not so vital as to deserve application of the excessively intolerant strict scrutiny standard. Numerous commentators have pointed to the need for and development of a more sensitive mode of heightened scrutiny to deal with such intermediate interests. *See, e.g.,* Blattner, *The Supreme Court's "Intermediate" Equal Protection Decisions: Five Imperfect Models of Constitutional Equality,* 8 Hast. Const. L. Q. 777 (1981); L. Tribe, *American Constitutional Law* §§ 16-25—16-32 (1978); and Gunther, *The Supreme Court 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv. L. Rev. 1 (1972).

Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980), illustrates the application of such an intermediate mode of scrutiny. Plaintiffs challenged a provision of Missouri's workmen's compensation law that automatically granted a wife benefits for her husband's death, but allowed a husband to recover for the death of his wife only if he proved his own incapacity or dependence on his wife's earnings. The Court held that such gender-based discrimination may only be upheld if it serves "important governmental objectives" and if the means employed are "substantially related to the achievement of those objectives." *Id.* at 150. Applying that standard to the facts, the Court found the Missouri law unconstitutional.

In *Michael M. v. Superior Court of Sonoma County,* 450 U.S. 464 (1981), all nine Justices recognized that California's statutory rape law should be reviewed under a more sophisticated mode of analysis than mere "rational basis." The opinion written by Justice Rehnquist and joined by the Chief Justice and Justices Powell and Stewart, noted that while gender-based distinctions are not subject to "strict scrutiny," they will be upheld only if they bear "a 'fair and substantial relationship' to legitimate state ends." *Id.* at 469, quoting *Reed v. Reed,* 404 U.S. 71 (1971). The dissenters applied the same more flexible mode of analysis, but concluded that the statute was unconstitutional.

And in *Kirchberg v. Feenstra,* 450 U.S. 455 (1981), the Court invalidated a Louisiana community property law, holding that a gender-based classification will only survive judicial scrutiny if a showing is made that "the classification is tailored to further an important governmental interest." *Id.* at 460.

3. Under *Plyler v. Doe,* heightened scrutiny applies to education

Just last Term, the Supreme Court for the first time applied heightened scrutiny to a case involving an alleged deprivation of the right to an education. In *Plyler v. Doe,* 102 S. Ct. 2382 (1982), the Court held invalid a Texas statute and policy denying free public education to children who were illegal aliens. The Court pointed out, in language entirely at odds with application of a mere "rational basis" test in a school finance case, that:

> "Public education is not a 'right' granted to individuals by the Constitution. . . . But neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction." 102 S. Ct. at 2397.

Emphasizing the permanent social stigma that would be caused by denying an education, the Court refused to apply the minimum level of scrutiny. 102 S. Ct. at 2398. It reviewed the long history of its pronouncements as to the importance of education, recognizing that education is vital to preserve our democratic institutions, *Wisconsin v. Yoder,* 406 U.S. 205, 221 (1972); *Abington School District v. Schempp,* 374 U.S. 203, 230 (1963) (Brennan, J., concurring), and to transmit fundamental values, *Ambach v. Norwick,* 441 U.S. 68, 76-77 (1979). It remarked that:

> "[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests." 102 S. Ct. at 2397.

The Court concluded that the classification could not be upheld because it did not further a sufficiently substantial state interest.

Justices Blackmun and Powell concurred, expressing agreement with the use of heightened scrutiny. Justice Blackmun pointed out that *Rodriguez* does not settle the question of precisely which rights get what degree of protection under the Equal Protection Clause:

> "Only a pedant would insist that there are *no* meaningful distinctions among the multitude of social and political interests regulated by the States, and *Rodriguez* does not stand for quite so absolute a proposition. To the contrary, *Rodriguez* implicitly acknowledged that certain interests, though not constitutionally guaranteed, must be accorded a special place in equal protection analysis." 102 S. Ct. at 2403.

4. New York's school finance scheme denies equal protection when measured under the "sliding scale" standard

Under sliding-scale, middle-tier, intermediate or heightened scrutiny, a legislative discrimination will pass muster only if the challenged provision "furthers some substantial goal of the State." *Plyler v. Doe,* 102 S. Ct. 2382, 2398 (1982). Put another way, a challenged classification, when subjected to heightened scrutiny, must "bear a 'substantial relationship' to 'important government objectives.' " *Michael M. v. Superior Court of Sonoma County,* 450 U.S. 464, 468-69 (1981), quoting *Craig v. Boren,* 429 U.S. 190, 197 (1976). In short, the more important the right, the more exacting the test which must be met by the State.

New York's school finance scheme fails any such sensitive test. When intermediate scrutiny was applied under the State Equal Protection Clause, both lower courts found the scheme infirm. The trial court held that "[t]he statutory plan for providing State aid has been shown by the evidence to operate unequally and to have a discriminatory impact on clearly identifiable segments of the pupil population of the State." 94 Misc. 2d at 523, A296. It inquired whether the statutory objective could be achieved by a "less objectionable alternative," and concluded that it could. The Appellate Division affirmed, stating:

> "All of the above circumstances supply a cogent reason for the application, if not of strict scrutiny, of the heightened scrutiny test . . . , and the State does not contend that no less objectionable financial aid scheme will advance the State's interest in the continuation of local control. Even under the 'less than strict' but not yet ' "toothless" standard of review', the statutory scheme fails." 83 A.D.2d at 257, A75 (citation and footnote omitted).

When it came to analysis of plaintiffs' federal equal protection claim, the same court shrank from heightened scrutiny, believing itself constrained by its reading of *Rodriguez.* The

time has come to determine whether *Rodriguez* should continue to have such a devastating effect on education claims, for, as the present case demonstrates, *Rodriguez* not only prevents meaningful analysis of federal equal protection challenges to school finance inequalities, but also tends to paralyze state constitutional jurisprudence in this vital area.

B. New York's school finance scheme cannot withstand even minimal scrutiny

As demonstrated above, the proper mode of equal protection analysis for New York's school finance scheme is the heightened scrutiny that this Court applies when the interests at stake are, like education, substantial if not "fundamental." Should this Court conclude, however, that the proper analysis here is the "rational basis" test used in *Rodriguez,* New York's school finance scheme still fails constitutional muster, because it is irrational under even the most deferential standard of review.

1. The "rational basis" test is not toothless

However "relaxed" the rational basis standard may be, it is "not a toothless one." *Logan v. Zimmerman Brush Co.*, 102 S. Ct. 1148, 1160 (1982) (separate opinion of Justice Blackmun, joined by Justices Brennan, Marshall and O'Connor), *Schweiker v. Wilson,* 450 U.S. 221, 234 (1981); and *Mathews v. Lucas,* 427 U.S. 495, 510 (1976). *See also Lindsey v. Normet,* 405 U.S. 56, 76-79 (1972), where the Court struck a section of Oregon's forcible entry and wrongful detainer law requiring a tenant appealing from an adverse judgment to post a double bond.

Indeed, just last Term this Court twice invalidated state laws as not rationally related to any legitimate state objective. In *Zobel v. Williams,* 102 S. Ct. 2309 (1982), the Court struck down Alaska's dividend distribution law, by which the state distributed income derived from the Prudhoe Bay oil reserves to adult citizens in amounts varying with the length of a citizen's residence in Alaska after 1959. The statutory scheme,

which discriminated not only between different classes of residents but also within those classes themselves, *id.* at 2312 n.5, was not rationally related to either of the legitimate objectives advanced by the state to explain the classifications.

And in *Logan v. Zimmerman Brush Co.*, 102 S. Ct. 1148 (1982), six Justices found that the Illinois Fair Employment Practices Act could not survive even minimal equal protection scrutiny. Under the Act, claims processed within 120 days received full consideration on the merits, and those bringing such claims were able to obtain full administrative and judicial review. Otherwise identical claims that were not processed—for whatever reason—within the 120-day period were fully and finally dismissed. This deadline provision was held not rationally related to any of the state purposes offered in excuse. These included alleged elimination of employment discrimination or protection of employers against frivolous claims (the Act's stated goals), hastening resolution of employment disputes (one rationale recognized by the Illinois Supreme Court) or encouraging timely hearings (a rationale also suggested by the Illinois Supreme Court and dismissed by four Justices as "the exercise of a strained imagination"). *Id.* at 1161 (separate opinion of Justice Blackmun, joined by Justices Brennan, Marshall and O'Connor).

2. The Court of Appeals applied a toothless version

In the present case, the Court of Appeals failed to follow this Court's example, and it applied a manifestly toothless version of the "rational basis" test. The court acknowledged the "careful and detailed factual determinations" made by Justice Smith after a long trial and then meticulously revised by the Appellate Division, after repeated sessions with counsel, to reflect new data and legislative amendment. 57 N.Y.2d at 37, A11. Justice Smith had found as a fact that, far from serving the State's asserted purpose of "remedying inequalities . . . which would exist in the absence of intervention by means of State aid," the complex state aid formulas, flat grants and "save-harmless" provisions have a disequalizing effect. 94

Misc. 2d at 526-27, A299; Finding 7(g), A116. The Appellate Division added that, far from enhancing the State's asserted goal of preserving local control, "[b]udgetary constraints resulting from the operation of the school finance scheme render local control over education illusory in property-poor school districts." Finding 80, A156. *See* 83 A.D.2d at 242-243, A60-61. The Appellate Division also found "no inconsistency between achieving greater financial and tax equalization and preserving local control." Finding 83, A159. While purporting to accept these fact findings, as it must under New York law, the Court of Appeals concluded in Panglossian fashion that any system different from the present one "would inevitably work the demise of . . . local control," and held the current scheme rationally related to achieving the State's alleged goal of enhancing local control. 57 N.Y.2d at 46-47, A20-21.

To accept the carefully documented findings that operation of a challenged law defeats the very goal for which the legislature purportedly designed it, and then baldly to conclude that the law is nonetheless rationally related to achieving that goal, is itself irrational.

3. New York's school finance scheme is not rationally related to achieving any legitimate state purpose

As the plurality opinion in *Logan v. Zimmerman Brush Co., supra,* makes clear, discriminatory legislation which in operation fails rationally to promote any legitimate state goal cannot withstand even minimal scrutiny. The justification belatedly advanced in support of New York's school finance scheme is preservation of local control. But as the trial court and the Appellate Division found, the goal is not served by a scheme which Justice Hopkins described as "a patchwork mounted on patchwork, an Ossa of confusion piled on a Pelion of disorder." 83 A.D.2d at 269, A87.

The much-amended statutory scheme now contains a complicated two-tier aid formula. As described in Finding 7, A113-116, districts are entitled to state assistance to raise

$1,650 per weighted pupil by imposition of an 11.57 mill tax on their own full value tax base. To the extent such a levy would not raise $1,650 per weighted pupil, the State supplies the difference. A second tier of the formula provides aid to districts with less than 125 percent of the state average personal income wealth.

But the allegedly "rational" and assertedly "equalizing" formula applies only fitfully—and often not at all. Notwithstanding the formula, which would automatically eliminate aid to any district with full value of more than $142,610 per pupil and per pupil income wealth of more than $37,125, each district—even the richest—is guaranteed a minimum of $360 per pupil (the "flat grant"), regardless of its real property or income wealth.[7] Moreover, alternative ways to calculate entitlements allow districts to insulate themselves from operation of the formula when actual application would reduce aid. Districts with decreasing pupil counts may use "total save-harmless" provisions to maintain current aid at some past level. Districts with sharp increases in property values, which under the formula would automatically reduce state aid, may receive the same aid per pupil they got in previous years. These alternatives have become so pervasive that the statutory formula fails to operate in almost one-half of all school districts.[8]

The Court of Appeals erred in assuming that, because the Texas school finance scheme had been found rationally related to legitimate state objectives, it could simply transfer the same

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7 Indeed, the Rubin Commission found that the richest flat-grant districts receive more state aid than the moderately rich. For example, in 21 districts with full value between $150,000 and $200,000, average state aid is $451 per pupil, whereas in 22 districts with full value over $250,000, the average state aid is $462. In this group, the richest district receives the most state aid—$754 per pupil. *Rubin Commission Report*, Vol. 2 at p. 18.

8 At time of trial, the formula whose "rationality" defendants so passionately avow, applied to only 9 of the State's 708 districts. Fully 699 districts were on some form of "save-harmless." The number is now 308, including 88 which are also flat-grant districts.

conclusion to the statutory scheme in New York. There is no factual basis for that assumption.

The late Dr. Joel Berke, who testified as plaintiffs' principal trial witness, was also the author of the main affidavit submitted in support of plaintiffs' case in *Rodriguez*. At trial before Justice Smith, Dr. Berke explained that the Texas court had before it statistical evidence from only a small sampling of the more than 1,000 Texas school districts, that school districts in Texas were far more difficult to compare than districts in New York, and that the discriminatory pattern in Texas—the relationship between disparities in local property wealth and in expenditures per pupil—was far less consistent in Texas than in New York. Nor was evidence adduced in Texas concerning the relationship between differences in expenditures and the provision of different levels of educational opportunities.[9]

Apart from these differences, New York's statutory scheme has features which sharply distinguish Texas's. Defense counsel for both States sought to justify inequalities among districts by pointing to the allegedly benign intent behind aspects of the two state aid formulas. However valid such arguments may have been in Texas, they have little force in New York where, at the time of trial, 699 of the State's 708 major school districts received state aid, not pursuant to the aid formula, but according to one or another "save-harmless" provision.

This gave the trial in New York an eerie quality—for however cogent were the arguments to explain one or another piece of the Emperor's attire, in New York the Emperor wore no clothes. Moreover, the force of the allegedly equalizing features of the state aid formula was blunted by "flat grants" given even to the richest districts, by allocating aid on the basis of average daily attendance which penalizes poor districts which invariably have high truancy rates, and by failure of the

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9 These deficiencies in the Berke affidavit relied upon by the three-judge court in Texas were in fact focused on by the *Rodriguez* majority. *See Rodriguez*, 411 U.S. at 26-28.

statutory scheme to take into account either the greater educational needs of poor districts with their high concentrations of problem children, or differences in costs experienced by districts in various parts of the State.

In short, whether or not the particular finance scheme used in Texas was rationally related to legitimate state objectives has little to do with whether the quite different scheme actually operating in New York has a rational connection with the objectives proffered by New York State.

The Court of Appeals declined to make any genuine inquiry into the connection, if any, between local control and the challenged statutory scheme, preferring instead simply to rely upon the conclusion in *Rodriguez*. That error has great consequence for the three million children whose level of educational opportunity is determined by the vagaries of the New York—not the Texas—statutory scheme. Nor is it enough to isolate the discrete elements that make up this "jungle of labyrinthine incongruity," 83 A.D.2d at 269, A87 (Lazer, J., concurring) and find each one reasonably related to some legitimate state purpose, as the Court of Appeals did, 57 N.Y.2d at 45-47, A19-21. For, as Justice Smith correctly observed:

> "A rational basis for discriminatory treatment is not established . . . by isolating components of the State aid scheme and urging that individually they bear a substantial relation to the statutory purpose. It is the totality of the formula and its operative effect that have been challenged rather than the rationality of any discrete element. The evidence amply supports the conclusion that the plenary operation of the State aid formula does not bear a rational relation to the objectives for which it was devised." 94 Misc. 2d at 527, A300.

CONCLUSION

How New York allocates ten billion dollars of educational resources each year among 700 school districts in order to educate three million school children is of profound social, political and legal significance. The manner in which alleged inequities in this scheme are evaluated under the Federal Equal Protection Clause determines whether vital rights are to be more than a promise made to the ear, but broken to the heart. This Court should note probable jurisdiction to determine whether the New York Court of Appeals applied an adequately sensitive level of judicial scrutiny to appellants' federal equal protection claim, and whether the court's conclusion that New York's statutory scheme is rationally related to legitimate state objectives was more than lip service.

Respectfully submitted,

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